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Nos. 80-207, 80-213, 80-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CBS, INC.,
Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*

AMERICAN BROADCASTING COMPANIES, INC.,
Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner
v.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, *et al.*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC. IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard of judicial review or otherwise abused its discretion in affirming the Federal Communications Commission's Orders implementing the "reasonable access" provisions of Section 312(a)(7) of the Communications Act in the case below.

2. Whether the FCC's interpretation and implementation of Section 312(a)(7) which was affirmed by the court of appeals contravenes the First Amendment.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT	2
I. THE COURT OF APPEALS CAREFULLY PERFORMED ITS REVIEW FUNCTION IN AFFIRMING THE COMMISSION'S ORDERS	2
A. The Plain Wording and Legislative History of Section 312(a)(7) Show That Congress Created an Affirmative Right of Access For Candidates For Federal Elective Office	4
B. The FCC's Implementation of Section 312 (a)(7) was Reasonable and, as the Court of Appeals Found, is Supported by the Record	7
II. THE FCC'S CONSTRUCTION OF SECTION 312(a)(7), AS AFFIRMED BY THE COURT OF APPEALS, PROMOTES RATHER THAN CONTRAVENES THE FIRST AMENDMENT	10
CONCLUSION	12

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TABLE OF AUTHORITIES

CASES — Page

Columbia Broadcasting System, Inc. v. *Democratic National Committee*, 412 U.S. 94 (1973) ..... *passim*
Consolo v. *Federal Maritime Commission*, 383 U.S. 607 (1966) 3
Farmers Educational Cooperative Union of America v. *WDAY, Inc.*, 360 U.S. 525 (1959) 5
Federal Trade Commission v. *Standard Oil Co.*, 355 U.S. 396 (1958) 3
Red Lion Broadcasting Co., Inc. v. *Federal Communications Commission*, 395 U.S. 367 (1969) .. 10, 11
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 (1951) 3

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment to the U.S. Constitution ..... *passim*
Communications Act of 1934, as amended, 47 U.S.C. §§ 151, *et seq.*

47 U.S.C. 312(a)(7) ..... *passim*
47 U.S.C. 315 ..... 5, 6

Federal Election Campaign Act of 1971, Pub.L. No. 92-225, 86 Stat. 3 (1972) 4, 5

LEGISLATIVE MATERIALS

Hearings Before the Communications Subcommittee of the Senate Committee on Commerce, 93rd Cong., 1st Sess., ser. 93-4 (1973) 6
S. Rep. No. 96, 92d Cong., 1st Sess. 20 (1971) reprinted in [1972] U.S. Code Cong. & Ad. News 1773 5
S. Rep. No. 229, 92d Cong., 1st Sess. 56 (1971) reprinted in [1972] U.S. Code Cong. & Ad. News 1821 5
117 Cong. Rec. 28792 (1971) 5

TABLE OF AUTHORITIES—Continued

Page

ADMINISTRATIVE DECISIONS AND REPORTS

Report and Order, Commission Policy In Enforcing Section 312(a)(7), 68 FCC2d 1079 (1978).. 5, 8, 9

Public Notice, Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 FCC2d 510 (1972) 6

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COUNTERSTATEMENT OF THE CASE

This case is the culmination of requests made to each of the three national television networks by the Carter/Mondale Presidential Committee, Inc. (hereinafter "Committee") to purchase one-half hour of time on one of the networks for use by Jimmy Carter in connection with his formal announcement of candidacy for renomination. As was the case in the proceedings before the court of appeals, the Committee is submitting a brief for two reasons. First, a presidential candidate's right of access to television is directly at stake. Second, the arbitrary refusals by all three networks to respond meaningfully to its request constitute a direct threat to the efficacy of the Federal campaign system enacted by Congress in 1971. In submitting this brief, the Committee has concentrated on those points of legislative history and constitutional law which demonstrate that the FCC's orders and the court's opinion affirming these orders were clearly contemplated by the statutory scheme enacted by Congress and equally compelled by Constitutional and public policy considerations.

To avoid burdening the Court with a further detailed counterstatement of the case, the counterstatement contained in the Brief for the Federal Respondents in Opposition summarizing the proceedings below is adopted.

ARGUMENT

I. THE COURT OF APPEALS CAREFULLY PERFORMED ITS REVIEW FUNCTION IN AFFIRMING THE COMMISSION'S ORDERS.

The court of appeals correctly found that § 312(a)(7) of the Communications Act of 1934, as amended, 47 U.S.C. § 312(a)(7) embodies an affirmative, albeit limited, right of access for candidates for federal elective

office to advocate their candidacies by direct broadcast communication to the electorate. In affirming the Commission's orders, the court scrupulously reviewed the intent and purposes of Congress in enacting § 312(a)(7), as reflected both in the statute's plain meaning and legislative history, and the statute's application by the FCC to the conflicting and disputed factual assertions of the parties before it. Its unanimous judgment, with Circuit Judge Tamm concurring in Circuit Judge Bazelon's "fine opinion for the court" (Pet. App. 56a) in order to express his concern over "nonneutral government decision-making" in the political broadcasting area of the type which was not before the court,[1] reflects the most precise and careful type of judicial review of agency action that could be expected.

Further review by this Court is neither warranted nor necessary. An administrative agency's construction of its enabling statute is entitled to some deference. In this case, the FCC's conclusions as to its powers were carefully examined below. Moreover, the review of an agency's application of its mandate to the particular facts of a dispute is a matter which traditionally has been entrusted to the courts of appeals. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491 (1951). Only in the rare instance where the standards have been "misapprehended or grossly misapplied" is it necessary or appropriate for this Court to depart from its "usual rule of non-interference." See *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607 (1966); and *Federal Maritime Commission* v. *Standard Oil Co.*, 355 U.S. 396, 400 (1958). Such a rare instance is not presented in this case.

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[1] The majority shared these concerns and welcomed Judge Tamm's admonitions regarding the type of agency conduct that would be impermissible. Pet.App. 47a, fn. 117.

A. The Plain Wording and Legislative History of Section 312(a)(7) Show That Congress Created an Affirmative Right of Access For Candidates For Federal Elective Office.

In recounting the growth of political campaigns in our country through the 19th and 20th Centuries in which print, radio and television have played ever-increasing roles, the court of appeals summarized that we are now unquestionably in the "era of television campaigning" where "it would be hard to overestimate the importance of television to our political processes." (Pet. App. 12a) The ability of the networks to grant or deny access carries with it the power to profoundly influence the outcome of elections. It was against this backdrop that Title I of the Federal Election Campaign Act of 1971 (the Campaign Communications Reform Act) was properly viewed to be a long-sought and appropriate response to the recognized need for the television industry to play a more active and responsible role in the nation's political process.

Section 312(a)(7) of the Communications Act, mandating that candidates for federal elective office shall be accorded, *inter alia*, the opportunity to purchase "reasonable amounts of time for the use of a broadcasting station . . .", is one of the key features of this Title and charges the FCC with the responsibility for its enforcement. In accord with the Commission's interpretation of its duties, the court of appeals correctly held that it "*did not* merely codify prior FCC policy and that it *did* create a new right of affirmative access for candidates to federal elective office." (Pet.App. 14a) (Emphasis in original) Given the plain language of § 312(a)(7), supported by a clear legislative history, no other conclusion was possible.

The Commission's general political broadcasting policies, which have evolved under the basic public interest

provisions of the Communications Act, impose only broad and largely discretionary service responsibilities to give coverage to political campaigns generally. These policies do not mandate (except for the contingent right of equal opportunities under § 315) the appearance of particular candidates. See *Farmers Educational Cooperative Union of America* v. *WDAY, Inc.*, 360 U.S. 525 (1959). See also *Report and Order, Commission Policy In Enforcing Section 312(a)(7)*, 68 FCC2d 1079 (1978). In contrast, new § 312(a)(7) deals with the right of an individual federal "legally qualified candidate" to seek and obtain broadcast time to advocate "his candidacy." [2]

The court of appeals properly recognized that one of the indisputable purposes of the 1971 Reform Act (of which § 312(a)(7) is a key part), as reflected in its legislative history, is "to give candidates for public office *greater access* to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters." [3] The petitioners place great emphasis on the other legislative purposes of the Reform Act (which are alleged to be inconsistent with the court of appeals' interpretation of Section 312(a)(7)) and would ignore this basic purpose which is most germain to the consideration of Section 312(a)(7). Moreover, they would ignore the simultaneously adopted "conforming amendment" to § 315 of the Communications

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[2] It was of course proper for Congress to make this distinction in view of its basic constitutional responsibilities over the federal electoral process.

[3] S. Rep. No. 96, 92d Cong., 1st Sess. 20 (1971), reprinted in [1972], U.S. Code Cong. & Ad. News 1773, 1774 (emphasis added). See also S. Rep. No. 229, 92d Cong., 1st Sess. 56 (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 1821; 117 Cong. Rec. 28792 (1971) (statement of Sen. Pastore).

Act to limit the "no obligation" language of Section 315 to that particular section of the statute.[4]

This reading of the statute, as the court of appeals further reasoned, is also supported by subsequent events in the Senate concerning the provision. In a 1973 hearing reviewing Section 312(a)(7), then FCC Chairman Dean Burch testified as to the Commission's understanding that the section imposes the *additional specific requirement* that reasonable access be afforded candidates for federal office. This understanding had been previously set forth in the Commission's 1972 *Public Notice, Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC2d 510, 537-38 (1972). The Congressional guidance he requested, if the Commission's construction was in error, was met only with Senator Pastore's response that what the FCC had done to date in light of the provision was reasonable. (Pet.App. 19a)[5]

As they did before the court of appeals, the networks place a great reliance on this Court's opinion in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). This reliance

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[4] Clearly, as the court of appeals noted, "if § 312(a)(7) was merely intended to codify pre-existing obligations and add the sanction of revocation, no 'conforming amendment' to § 315 would have been required." (Pet.App. 18a).

[5] At that time, CBS was very much aware of the new affirmative obligations imposed by the statute and was urging its repeal. Dr. Frank Stanton, testifying for CBS, stated:

> Section 312(a)(7) now requires that on pain of license revocation a broadcaster must make available to candidates for federal elective office reasonable amounts of paid time or reasonable access to free time.

Pet.App. 19a, citing *Hearings Before the Communications Subcommittee of the Senate Committee on Commerce*, 93rd Cong., 1st Sess., ser. 93-4 (1973), at 137, 190.

is completely misplaced for the current posture of this case is precisely the reverse of the situation in *CBS* v. *DNC* where this Court was compelled to intervene. The court of appeals' decision therein had found a rather broad right of access for the public at large to be inherent in the public interest standard of the Communications Act, notwithstanding the judgment of the FCC otherwise and the absence of any specific mandate from Congress. In this case, however, the court of appeals has simply affirmed the FCC's expert and reasonable interpretation of the clear congressional mandate of access expressed in § 312(a)(7). As Judge Bazelon wrote:

> . . . in the case before us, the deference to Congress and the Commission which the Court manifested in *CBS* v. *DNC* cuts in favor of the existence of a limited right of access. Here, the Commission uses a statutory provision to *support*, rather than *resist*, the imposition of a limited affirmative right of access. (Pet.App. 21a-22a, emphasis in original, footnote omitted)

There is no need for this Court to intervene only to duplicate and reaffirm the exhaustive review efforts of the court of appeals.

B. The Commission's Implementation of Section 312(a)(7) Was Reasonable and, as the Court of Appeals Found, is Supported By the Record.

Having agreed with the Commission that § 312(a)(7) did create a new affirmative right of access in favor of legally qualified candidates for federal office, the court of appeals then satisfied itself that the Commission's orders implementing the statute and resolving the dispute before it were supported by the record and did not represent an abuse of discretion. Again, as is evident from the opinion, the court of appeals performed its review function with care and a proper appreciation for the rights and claims of the disputing parties. (Pet.

App. 22a-42a) The networks obviously do not agree with the court's resolution of these questions; however, they have presented no reason to extend the review process one step further to this Court.

The court of appeals reasonably concluded that "the Commission was justified in pronouncing its right to decide when in the campaign the access rights granted to candidates by § 312(a)(7) attach" in view of the essential "objective, non-editorial" character of this judgment. (Pet. App. 29a) This is a question of fact capable of objective appraisal which is no different from those which must be resolved virtually every day by an agency like the FCC. Instead of raising a danger of excessive government involvement in the partisan political arena, as the networks suggest,[6] the Court correctly pointed out that the Commission, if anything, actually narrowed the scope of the statute and limited its impact on broadcasters. (Pet. App. 28a-29a) Moreover, the reasonableness of this particular determination is buttressed by the fact that Mr. Carter was the *last* candidate in either major party to declare participation in the 1980 presidential race. By that time, it was surprising that the networks would have even considered taking the position that the campaign season had not begun and refuse to sell time for that reason.

Against this background, both the FCC and the court of appeals then carefully sifted the competing claims of the parties over the reasonableness of the networks' refusals to sell time. The review was not done in a vacuum but was undertaken pursuant to the general enforcement policies which the Commission had previously set forth in its 1978 Policy Statement. *Report and Order, Commission Policy on Enforcing Section 312(a)(7)*, 68 FCC2d 1079 (1978). In particular, this *Policy State-*

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[6] See, *e.g.*, ABC Petition For Writ of Certiorari, p. 14.

ment flatly proscribed arbitrary across-the-board bans on the sale of time of the type which the networks still seek to justify in their petitions before this Court. Similarly, the other considerations advanced by the networks for their refusals (potential disruption of regular network programming, the number of other candidates likely to invoke equal opportunity rights, and the timing of the request) were carefully reviewed, first by the FCC and then the court below, and found to be insufficient to outweigh the competing reasons to sell advanced by the Committee.

The networks do not really contest the FCC's actual findings in this respect—but rather complain over the Commission's right to review the reasonableness of their decisions in enforcing Section 312(a)(7). Without any reference to the considerations laid out by the Commission in its 1978 *Policy Statement*, two of the three networks had flatly refused the Committee's timely request, and the third had merely offered two five-minute slots in lieu of the standard half-hour block of broadcast time that had been requested. Such arbitrary, blanket sales prohibitions were precisely what the Commission had previously warned against. Before the FCC, the networks were given every opportunity to explain and justify their flat refusals to sell and their explanations were accorded the maximum credit possible. The record left the court of appeals with little alternative but to find that the Commission's orders were a "very reasonable effort at implementing § 312(a)(7)." (Pet. App. 42a)

The fact that no satisfactory explanations have ever been put forth by the networks for their refusals carries with it the strong suggestion that they would simply prefer to sell available broadcast time exclusively to national commercial advertisers. If so, this attitude totally disregards the importance of political speech in our sys-

tem of government. Hopefully, this has been corrected by both the FCC's and the court of appeals' well reasoned opinions.

II. THE FCC'S CONSTRUCTION OF SECTION 312(a)(7), AS AFFIRMED BY THE COURT OF APPEALS, PROMOTES RATHER THAN CONTRAVENES THE FIRST AMENDMENT.

As implemented by the Commission in this case, Section 312(a)(7) "is a constitutionally acceptable accommodation between, on the one hand, the public's right to be informed about elections and the right of candidates to speak and, on the other hand, the editorial rights of broadcasters." (Pet. App 47a) Far from violating the First Amendment rights of broadcasters (as the networks contend), the FCC's interpretation of this important Congressional mandate as affirmed by the court of appeals furthers the essential First Amendment objective in broadcasting—the paramount right of the *public* to be politically informed. As the court so effectively pointed out, "the public's right to be informed is nowhere stronger than in the area of elections. And no speech is more protected than political speech." (Pet. App. 45a)

The purpose of the First Amendment in the sphere of broadcasting is to preserve an uninhibited marketplace of ideas. Accordingly, the rights of broadcasters, those who wish to present their views over the airways, and the public all must be considered and appropriately balanced. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969). In this case, the court below carefully considered and weighed these competing rights, and correctly found that Congress and the FCC had reached an "acceptable accommodation" of all interests through the enactment and implementation of § 312(a)(7).

As noted in the court's opinion, "it is difficult to contend that the limited appropriation by government of

part of the available spectrum for use in informing the electorate is constitutionally unacceptable." (Pet. App. 45a-46a) *Red Lion* upheld the Commission's regulatory authority under the general public interest mandate of the Communications Act to require broadcasters under limited conditions to permit access to their facilities. Certainly, Congress (from whom the Commission receives its powers) has no less authority to act through legislation in an area where the nature of the speech sought to be fostered is of the highest priority.

Indeed, as this Court explained in *CBS* v. *DNC*, it is of special significance that a specific Congressional mandate is involved:

> . . . in evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission. . . . The judgment of the Legislative Branch cannot be ignored or under-valued simply because one segment of the broadcast constituency casts its claims under the umbrella of the First Amendment. That is not to say that we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. *The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how other branches of Government have addressed the same problem.*

412 U.S. at 102-3 (emphasis added)

Notwithstanding the networks' claims, the limited candidate access rights legislated by Congress in Section 312 (a) (7), as interpreted in the opinions below, do not interfere with their journalistic interests. Quite to the con-

trary, the scheme devised by Congress, implemented by the FCC and validated by the court of appeals shows great sensitivity to the operation of the First Amendment in broadcasting by preserving the essential journalistic freedom of broadcasters while, at the same time, providing for the needs of the electoral process.

CONCLUSION

For these reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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